IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, ETC.,
Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE POST-HEARING BRIEF AND POST-HEARING BRIEF

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE POST-HEARING BRIEF

Petitioner Connell hereby moves the Court for leave to file the attached post-hearing brief. In support whereof, Petitioner states as follows:

1. The purpose of the instant motion and brief is to respond only to new matter raised by the Respondent Union for the first time at oral argument.

2. On November 19, 1974, at oral argument of this matter, counsel for the Respondent Union brought to the attention of the Court for the first time a decision rendered by the National Labor Relations Board just two weeks earlier in the matter of *Los Angeles Building and Construction Trades Council (Joseph Freed & Benjamin H. Werber, d/b/a B & J Investments Company)*, 214

NLRB No. 86 (November 7, 1974). Counsel for the Union argued to the Court that, in this recent decision, the Board held that agreements such as are involved in this case are protected by the construction industry proviso to Section 8(e) of the NLRA; and that since the Board has so held, the subcontracting agreement at issue in this case was lawful under the NLRA and, therefore, antitrust exempt, even though Connell and the Union did not have a collective bargaining relationship.

3. Since Counsel for the Union cited this recent Board decision to the Court at oral argument for the first time, counsel for Connell did not have an opportunity to respond to this case. Moreover, since counsel for the Union implied that, by this recent decision, the Board has virtually disposed of one of the primary issues in this case (i.e., whether a collective bargaining relationship is necessary for the validity of a subcontracting agreement under the first proviso to Section 8(e)), a response to the Union's contention is appropriate.

WHEREFORE, Petitioner Connell respectfully moves the Court for leave to file the attached post-hearing brief.

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PETITIONER'S POST-HEARING BRIEF

At oral argument, Counsel for the Union brought to the Court's attention for the first time the Labor Board's recent holding in *Los Angeles Building and Construction Trades Council (Joseph Freed & Benjamin H. Werber, d/b/a B & J Investments Company)*, 214 NLRB No. 86 (November 7, 1974) and maintained that the Board's decision in that case was dispositive of issues raised in this antitrust case. Contrary to the Union's assertion made at oral argument, the Board did not hold in *B & J Investments Company* that a subcontractor's agreement is valid under the proviso to Section 8(e) of the NLRA even in the absence of a collective bargaining relation-

ship. The Board did not even consider the issue raised herein, as to whether such a relationship between a contractor and a union seeking such an agreement is necessary to legitimize and validate the agreement under that Act. The parties did not raise it; it was not litigated before the Administrative Law Judge; nor did the Board deal with it on review of the Judge's decision. Rather, the parties, the Judge and thus, the Board, assumed that the clause was valid, and the Board held that picketing to obtain such an assumedly valid clause did not force or require the Employer to cease doing business with other contractors in violation of Section 8(b)(4).

As Connell pointed out in its initial and reply briefs, in neither *Centlivre Village Apartments*, 148 NLRB 854 (1964), cited in *B & J Investment Company*, nor in those circuit courts of appeals' decisions relied on by the Union [1] in support of the argument that the issue presented herein has been decided, have the Board or the courts ever addressed themselves to that issue. In none of those cases, nor in any of those cited by the Board's General Counsel in his memorandum, has the issue been raised, litigated and decided. The Fifth Circuit herein below, after examining the case law, reached precisely the same conclusion.

Thus, *B & J Investment Company* merely restates the Board's view that picketing to obtain a valid "proviso" agreement is not violative of the NLRA. The case does not assist in answering the question of whether a stranger union's picketing to obtain an agreement requiring an employer to utilize only subcontractors who

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[1] *Construction, Production and Maintenance Laborers' Union, Local 38* v. *NLRB (Colson and Stevens)*, 323 F.2d 422 (9th Cir. 1963); *Essex County and Vicinity District Council of Carpenters* v. *NLRB*, 332 F.2d 636 (3rd Cir. 1964); *Orange Belt District Council of Painters No. 48* v. *NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Suburban Tile Center* v. *Rockford Building Trades Council*, 354 F.2d 1 (7th Cir. 1965).

have a collective bargaining agreement with the union is or is not protected by the first proviso to Section 8(e). Moreover, the fundamental question of whether a hot cargo clause which is not violative of 8(e) by virtue of the proviso may still be violative of the Sherman Act when the clause is coercively obtained from an employer who has no collective bargaining relation with the union is not answered by either *B & J Investments Company* or any of the cases upon which *B & J Investments Company* relies. The answer to that critical question is to be found principally in the *Jewel Tea* holding, 381 U.S. 676 (1965), that a union acting alone could violate the Sherman Act when its otherwise violative conduct was not in pursuit of a "legitimate labor interest." An action, even when not specifically violative of a sanction of the National Labor Relations Act, is obviously not necessarily a legitimate labor interest and therefore independent inquiry must be made of the questioned union conduct to determine whether the *Jewel Tea* standards are met.

Therefore, since issues critical to the resolution of this case have never been ruled on by the Board or the courts, it is essential that the Court be made aware of the fallacy in placing reliance on *B & J Investments Company* as determinative of whether or not under *Jewel Tea* the Union's conduct herein failed to comport with national

labor policy and is therefore nonexempt from antitrust proscription.

Respectfully submitted,

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